MISCELLANY.

COMMON-LAW-MARRIAGES.—In view of the recent decision by the Virginia Court of Appeals (to be hereafter published), denying the validity of a common-law marriage in this State, the following account of recent legislation in New York, on that subject, taken from the *Albany Law Journal*, may be of interest:

"The law abolishing so-called common-law marriages, which was enacted by the legislature of New York at its last session, went into effect on January 1, 1902. It provides that a marriage which is not solemnized by a minister or other authorized person shall not be legal, unless the persons desiring to marry sign a written contract in the presence of at least two witnesses subscribing to the same. The contract must state the place of residence of each of the parties and witnesses and the date and place of marriage, and must be acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded. Such contract shall be filed within six months after its execution in the office of the clerk of the town or city in which the marriage was solemnized. The new law further provides that no marriage claimed to have been contracted on or after January 1, 1902, within this State, otherwise than in this article provided, shall be valid for any purpose whatever, provided, however, that no such marriage shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same, if consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage, or on account of any mistake in the date or place of marriage or in the residence of either of the parties."

PARTNERSHIP ASSOCIATIONS.—We published in a recent number (*ante* p. 463) an article by Mr. Gordon Paxton, of the Norfolk bar, in which attention was called to various deficiencies in the Virginia statute, regulating the formation and conduct of partnership associations. In pursuance of these suggestions, the Virginia legislature has amended the statute, by an Act approved March 14, 1902. The following is a copy of the amendatory Act—the changes being shown in italics:

AN ACT

To amend and re-enact section 2878 in chapter 135 of the Code of Virginia, relating to partnership associations with limited liability; and also to provide that such associations shall sue and be sued only in their association name, and may take, hold and convey real estate in like manner.

Approved March 14, 1902.

Be it enacted by the General Assembly of Virginia, That section twenty-eight hundred and seventy-eight in chapter one hundred and thirty-five of the Code of Virginia be amended and re-enacted so as to read as follows:

§ 2878. When three or more persons desire to form a partnership association for the purpose of conducting any lawful business in or out of this state, whose principal office or place of business shall be in this state, by contributing capital

thereto, which capital only shall be liable for the debts of the association, they may sign and acknowledge, before any person authorized to take acknowledgements of deeds in this state, a statement in writing, in which shall be set forth the name of the association, with the word "limited" added as a part thereof; the names of the officers and members composing it; its contemplated duration, not however, to exceed twenty years; the character and location of the business to be conducted; the total amount of capital of the association, when and how to be paid, and the amount subscribed by each member. *Contributions to the capital of such an association may be made either in money, or in real or personal estate at a reasonable valuation to be approved by all the members subscribing to the capital of such association; and in the said statement subscriptions to the capital, whether in cash or in property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted. And any amendment of the said statement, made for the purpose of increasing the capital stock or for other purpose, shall be made only in like manner.* Such statement *and amendments* shall also contain such a waiver as is mentioned in section thirty-six hundred and forty-seven of the code by each member as to any debt he may at any time owe the association. And the said statement *and amendments* shall be recorded in the *partnership book, as limited partnerships are directed to be recorded in section twenty-eight hundred and sixty-six of the code,* in the clerk's office of the court of the county or corporation wherein the principal office of the association is established; and the said statement *and amendments* shall also be published once a week for two successive weeks in a newspaper published in such county or corporation, if one there be. The association shall also keep at all times a subscription book, showing the names of its members and the amount of capital remaining unpaid upon their respective subscriptions, which book shall be open to the inspection of creditors and members of the association at all reasonable times.

A fee shall be paid to the clerk in whose office the said statement is directed to be recorded by any partnership association that may hereafter be organized under this section, which fee shall be equal to one-half the charter fee which such association would have been required by law to pay if incorporated under section eleven hundred and forty-five of the Code of Virginia. The clerk shall not admit the said statement to record until said fee shall have been paid; and after recording said statement, he shall pay into the state treasury such fee in the mode prescribed by law. But the validity of any partnership association that may have been created under and by virtue of this section, before this amendment comes into operation, shall not be affected by any change that is hereby made in this section.

2. *That every partnership association which has heretofore been created under and by virtue of section twenty-eight hundred and seventy eight of the code of Virginia, or which may hereafter be created under the said section as amended by this act, shall sue and be sued in their association name, and not in or by the individual names of the members thereof. And service of process against, or notice to, any such association in any suit or legal proceeding shall be made upon the president, secretary or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association.*

3. *That any such association may take, hold, encumber, lease and convey real estate or interest therein in their association name, either in fee simple or for any less estate. And*

such an association shall have the right to adopt and use a common seal, and to acknowledge their deeds or other writings by their president and secretary. But nothing contained in this act shall be construed to have the effect of incorporating partnership associations.

AGENT'S KNOWLEDGE OF BREACH OF RESTRICTIONS OF AN INSURANCE POLICY AT ITS INCEPTION.*—The United States Supreme Court has recently handed down an important decision, which refuses to recognize the well established New York doctrine of *Van Schoick* v. *Niagara Fire Ins. Co.* (1877), 68 N. Y. 434. A policy containing a provision against other insurance was issued to an applicant, who had prior insurance to the knowledge of the insurer's agent. Parol evidence of the agent's knowledge was deemed inadmissible. *Northern Assurance Co.* v. *Grand View Building Association* (1902), 22 Sup. Ct. 133. The court asserts that the mode of reasoning of the New York cases "overlooks both the general principle that a written contract cannot be varied by parol evidence and the express provision that no waiver shall be made by the agent except in writing, indorsed on the policy."

The position of SHIRAS, J., on the first objection seems unassailable. In *Van Shoick* v. *Ins. Co.*, *supra*, it was held that the company would be *estopped* to set up a restriction known to its agent to be broken when the policy was delivered and premium paid. It is clear that the ordinary elements of estoppel are wanting since there is no reliance on any representation of a fact, unknown to the insured. *Franklin Ins. Co.* v. *Martin* (1878), 40 N. J. L. 568. Moreover it cannot be treated as a waiver of a condition of the contract, since a condition assumes that the contract has come into existence. Langdell, Summ. of Cont. sec. 28. Nor does a court of law thus accomplish what a court of equity reaches by reformation of an instrument since, no mutual mistake existing, no ground for reformation in equity arises. *Shannon* v. *Gore Dist. Mut. Fire Ins. Co.* (1878), 2 Ont. App. Rep. 396; *Commonwealth Ins. Co.* v. *Huntzinger* (1881), 98 Pa. St. 181. So on common law principles, the case at hand seems right.

However, the further objection of want of authority in the agent to waive is hardly tenable and is based on a misconception of the New York decisions. The knowledge of an agent to secure information is held the knowledge of the insured. Assuming that such knowledge can be shown by parol evidence to strike out a restriction, the authority of an agent to waive conditions of the policy is not involved. The company, by authorizing an agent to receive information, binds itself by his knowledge. So the New York courts have logically held. *Wood* v. *American Fire Ins. Co.* (1896), 149 N. Y. 382. On the other hand, in cases where facts subsequent to the issuing of a policy are known to the agent, his authority to waive a condition is in question. His power to do it only in fixed ways is a fair provision and will be enforced. *Baumgartel* v. *Ins. Co.* (1892), 136 N. Y. 547. The New York doctrine seems a justifiable bit of judicial legislation. A practical and just exception to the parol evidence rule may well be taken in insurance policies, which contain many and complex warranties, proceed wholly from the company and are issued through zealous agents. This anomalous view, at least, has produced satisfactory results. It has met with favor in Connecticut,

*See Mutual Fire Ins. Co. *v* Ward, 95 Va. 231; Georgia Home Ins. Co. *v.* Goode, *Ib.* 751; Farmers' etc. Ass'n *v.* Williams, *Ib.* 248; Va. F. & M. Ins. Co. *v.* Goode, *Ib.* 762.

McGuirk v. *Hartford Fire Ins. Co.* (1888), 56 Conn. 528, and generally in the Western States. May on Ins., 4th ed., sec. 33A. Nor is the criticism of indefiniteness well taken. From its nature the so-called estoppel or relinquishment operates to cut out warranties of the policy and cannot raise a new term. *Landers* v. *Cooper* (1889), 115 N. Y. 279. It should not be applied to cases of collusion between the insured and the agent. *National Life Ins. Co.* v. *Murch* (1873), 53 N. Y. 144. The clear rule has become somewhat unsettled by the recent case of *Skinner* v. *Norman* (1901), 165 N. Y. 565, holding that an agent's promise to get information was the constructive knowledge of the insurer. See criticism in 1 Columbia Law Review, 262. It is interesting to note that the Texas court has intimated that the warranty is suspended for a reasonable time, if its terms may easily be complied with. *Germania-American Ins. Co.* v. *Evants* (1901), 61 S. W. 536.

The decision most relied on by the insured in the principal case was *Union Mut. Ins. Co.* v. *Wilkinson* (1871), 13 Wall. 222. In that case the applicant stating his ignorance of material facts, the agent erroneously filled in the application. Parol evidence of the statements of the insured were admitted to prove that the representations were, in reality, those of the agent, and the insurer was estopped to set up its defence. This was affirmed in *Ins. Co.* v. *Mahone* (1874), 88 U. S. 152, and *N. J. Mut. Life Ins. Co.* v. *Baker* (1876), 94 U. S. 610, and limited in *N. Y. Life Ins. Co.* v. *Fletcher* (1886), 117 U. S. 519, to cases of no negligence in the insured and good faith on the part of the agent, where no limitation of his authority was conveyed to the insured. On this narrow ground very little is left of the decision. The principal case tries to distinguish it "as in legal effect a denial of the execution of the statement." The application, adopted by the insured should on common law principles have been conclusively presumed to contain representations of the insured. See *Franklin Fire Ins. Co.* v. *Martin, supra.* It seems that the Wilkinson case cannot be reconciled with the decision at hand. As a result of the principal case, the insured will be forced to sue in the State of the defendant company to prevent removals to the United States courts. *Dewees* v. *Batchelder Fire Ins. Co.* (1872), 6 Vroom, 366, and *Batchelder* v. *Ins. Co.* (1883), 135 Mass. 449, *accord.*—*Columbia Law Review.*

THE SUBSOIL OF HIGHWAYS.—There has been a considerable amount of litigation during recent years in regard to the respective rights of local authorities and adjoining owners in the subsoil of roads and streets. In the well-known case of the *Mayor of Tunbridge Wells* v. *Bird* (1896), A. C. 434; 60 J. P. 788, the House of Lords decided with considerable clearness that the subsoil of a street does not vest in a local authority, but merely so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street. The dictum of Lord Bramwell in *Coverdale* v. *Charlton*, 4 Q. B. D. pp. 116, 118, to the contrary was expressly overruled. The Court of Appeal have since held that the principle laid down in the *Tunbridge Wells* case is equally applicable to London. (*Battersea Vestry* v. *London and Brush Electric Lighting Company* (1899), 1 Ch. 474.)

For many years local authorities had relied on the dictum of Lord Bramwell in the above-mentioned case, and it was generally considered that they might use the

subsoil immediately under the road and allow other people to use it without in any way consulting the real owner. Others have also, in consequence, been somewhat careless of their rights, and have very rarely asserted them. There is no doubt, however, that such rights exist, and in course of time they may become of very considerable importance and value.

The difficulty now is to determine in whom the ownership of the soil is actually vested. It is a very old and generally accepted presumption that the subsoil of a highway belongs to the adjoining owner, the owner on each side having half. This presumption has been repeated in cases time and again, and one would almost have thought that the time had gone by in which it might be questioned. Lord Tenterden, L. C. J., in *Rex* v. *Edmonton*, 1 M. & Rob. 32, stated the doctrine thus: "The presumption that roads are the property of the adjacent owners is founded on the supposition that the roads originally passed over the lands of the owners, and therefore still belong *ad medium filum viæ* to the adjacent owners."

Of course this is only a presumption, and may be rebutted. The soil may belong to the lord of the manor; he may have reserved it to himself, or he may show that it does so by the fact that he has exercised acts of ownership over it. Then, again, there may be instances where the road has been made under a statute, in which case the trustees of the road may have in fact actually purchased the soil. A similar result may be attained in the event of the highway authority having purchased land to widen the road. In that case the subsoil of the land so purchased would belong to them, and it is also probable that the subsoil up to the middle of the highway might pass with the conveyance.

In a general way the subsoil of the highway passes with the conveyance of a house adjoining it even although the land conveyed is described as bounded by the highway. This also is a well settled presumption of the law, althongh it also is capable of being rebutted. It was re-stated very clearly by Cotton, L. J., in *Micklethwait* v. *Newlay Bridge Company*, 33 Ch. D. 133, as follows: "The rule of construction is now well settled that where there is a conveyance of land, even although it is described by reference to a plan, and by color and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then, on the true construction of the instrument, half the bed of the river or half the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties." Of course there may be circumstances in which the presumption would not apply. Thus James, L. J., in *Beckett* v. *Corporation of Leeds*, L. R. 7 Ch. App. 421, said he would be slow to find the presumption as applicable to the case of a road which went through an estate and a site was granted by the road-side for the erection of a cottage.

It has been suggested that the presumption that the soil in the highway passes to the adjoining owners with the conveyance of their houses is not applicable to streets in towns, and the last cited case has been quoted as throwing doubt on the presumption. We must confess that we are unable to see any logical reason for distinguishing streets in towns from any other highways, and we also fail to find anything in *Beckett* v. *Corporation of Leeds* (*supra*) which suggests that any distinction is to be drawn between streets in towns and roads in other districts. The point, however, was expressly raised and decided by Romer, J., in *In re White's Charities* (1898), 1 Ch. 659, where it was held that the presumption that half the

soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country. Romer, J., in discussing the general rule said; "I have never before heard it argued, and certainly it has never been actually decided, that the presumption does not apply to conveyances of houses bordering on streets in towns; nor do I see any sufficient reason why the general rule should not apply to streets in towns as well as to highways in the country. Why should towns be excluded? And if towns were excluded, where would you limit the exception from the rule? Would a country town be excepted? Would a small town? Would a village? Would a hamlet? Where are you to stop? It seems to me that unless there are certain circumstances connected with the particular town, the rule applies to streets in towns as it does to highways in the country."

The point has again been referred to in the still more recent case of *London and North Western Railway* v. *Westminster* (1901), W. N. 230; 18 T. L. R. 74. In that case Joyce, J., after referring to *Beckett* v. *Corporation of Leeds* (*supra*) and the above judgment of Romer, L. J., in *In re White's Charities*, stated that he did not consider this last case to be an altogether satisfactory authority, and he evidently considered that the matter was one for a higher court. Counsel, however, appear to have taken a different view and hardly to have contested the application of the presumption to the case in question. The road in that case was in Westminster and the matter over which the dispute arose was, as in the *Tunbridge Wells* case, an underground urinal. By the Public Health (London) Act, 1891, s. 44, the sub-soil of the roadway is vested in the sanitary authorities of the metropolis for the purpose of making these urinals, but no part of the footway is so vested. The defendant council in making such a urinal had placed part of the staircase on the footway and in the subsoil thereof, and an application was made to restrain them from continuing the trespass on the subsoil of the plaintiff company who owned the adjoining premises. Judgment was given for the plaintiff company, but it is evident that it was so given by the learned judge with great reluctance.

It seems to us, however, that it is of greater importance in towns that the subsoil should belong to the adjoining owners than it is in country districts. Every such owner requires to use the subsoil for many purposes. His gas and water pipes connecting his house with the mains are laid in it, so are his drains which join him with the sewer, and in not a few cases there are underground basements which project under the street. If the subsoil were vested in some one else the owner would be subject to continual trouble, might be rendered liable for many actions of trespass, and also to the payment of compensation for each pipe laid in the soil of another. In the case of land purchased by tramway companies for road widening, these difficulties may one day present themselves, and the ownership of the subsoil of these strips is a matter which both adjoining owners and local authorities should carefully consider. . . . .

On the whole it must be considered that the law is fairly clear, and in conformity with practical convenience. Persons have only a right to pass and repass on a highway, and local authorities have only so much right in the highway as is required to preserve that right of passage. That was the old doctrine; but latterly the road has been regarded as the proper site for all kinds of public undertakings,

and the owner of the subsoil is often the only person who is not consulted, and his rights have been considered of such small value that they have often been taken from him without complaint and without compensation. The old doctrine is, however, still the law, and can be invoked by owners for their protection if it should be found necessary.*—*The Justice of the Peace* (*London.*)

[* The English rule here stated as to ownership of the soil of a public street or highway, and as to the presumptions obtaining, prevails generally in America. See 2 Devlin on Deeds, (1st ed.) 1024-1025; 2 Dillon, Munic. Corp. (4th ed.) 633 (n); Harris *v.* Elliott, 10 Pet. 53; note 54 Am. Dec. 790; note 67 Am. Dec. 413; W. U. Tel. Co. *v.* Williams, 86 Va. 696, 19 Am. St. Rep. 908 and note; Hodges *v.* Seaboard etc. R. Co., 88 Va. 653; Page *v.* Belvin, 88 Va. 985; Lowe *v.* Tibbetts, 72 Me. 92, 39 Am. Rep. 303, and note.—EDITOR VA. LAW REG.]